BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUDITH ELAINE BROBST	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 152,447, 152,448 &
	)	152,449
BRIGHTON PLACE NORTH	)	
Respondent	)	
AND	)	
	)	
CHURCH MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent and its insurance carrier request review of the Award of Administrative Law Judge Floyd V. Palmer entered in this proceeding June 30, 1994.

APPEARANCES

Claimant appeared by his attorney Elmer J. Schumacher of Topeka, Kansas. The respondent and it insurance company appeared by their attorney Andrea S. Stubblefield of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by its attorney Jeffrey K. Cooper of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award of the Administrative Law Judge.

ISSUES

The Application for Worker's Compensation Board Review and Docketing Statement filed on behalf of respondent and its insurance carrier identified the issues for review as follows:

> "The specific issues respondent wishes to address are:
> 1. Did Claimant suffer a 4% work [sic] disability as a result of her injury of April 14, 1990?
> 2. Did Claimant aggravate, exacerbate or intensify the injury suffered in April of 1990 in stepping off the curb and thereby twisting her ankle upon leaving the seminar of 10/12/90[?] If so, are either of the injuries compensable?
> 3. Is Claimant unable to perform her duties as LPN for the Respondent within the restrictions imposed by Dr. Shaw?
> 4. Are Dr. Shaw's restrictions reasonable and necessary?
> 5. Has Claimant suffered a 71.03% work disability following her second accident, following the fall from the curb on [O]ctober 12, 1990?
> 6. Are Claimant's injuries of the nature and extent alleged by Claimant or as found by Judge Palmer?"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Docket No. 152,449

After reviewing the entire record, the Appeals Board finds that the Award of the Administrative Law Judge granting claimant a 4% permanent partial general body disability should be affirmed.

Counsel for the respondent conceded in oral argument to the Appeals Board that he did not disagree with the finding by the Administrative Law Judge of a 4% functional impairment. As noted by the Administrative Law Judge in his findings, the claimant did not miss any work as a result of her first accident of April 14, 1990 and therefore she should be compensated based upon her impairment of function rating only. With respect to this docketed claim, respondent admitted that claimant met with personal injury by accident on April 14, 1990 and that her injury arose out of and in the course of her employment with

respondent. Accordingly, since respondent now does not dispute the 4% functional impairment finding by the Administrative Law Judge and since the Judge's Award was for a 4% permanent partial general body disability, it appears that nature and extent of disability is no longer an issue. The remaining issues listed by the respondent in its application for Board review do not appear to specifically apply to this claim. As no review is sought by any party as to the other issues listed in the Award under Docket No. 152,449, the Appeals Board finds that the award by the Administrative Law Judge in Docket No. 152,449 should be affirmed in all respects.

Docket No. 152,447

This is the docket number to which all but the first of the issues raised by respondent in its application for review apply. Having reviewed the entire record, the Appeals Board finds the findings and conclusions enumerated in the Award of the Administrative Law Judge to be accurate and appropriate and adopts same as its own findings with the exception of the percentage of work disability. In so finding, the questions raised by respondent in its Application for Review numbered 2, 3 and 4 are answered in the affirmative. For the reasons set forth below, issue numbers 5 and 6 are answered in the negative.

The Award of the Administrative Law Judge sets out his findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. Specifically, the Appeals Board agrees that claimant has sustained her burden of proof that she aggravated, exacerbated or intensified the low back injury she suffered in April of 1990 in stepping off the curb and twisting her ankle upon leaving the seminar of October 12, 1990. The injuries of October 12, 1990 are compensable and specifically are found to have arisen out of and in the course of her employment with respondent. The permanent restrictions imposed by Dr. Joseph Shaw are reasonable and necessary. Those restrictions render claimant unable to perform her regular duties as an LPN for the respondent.

The thrust of respondent's argument as to this docketed claim goes to the issue of whether an injury which occurred while claimant was attending a seminar at Washburn University on October 12, 1990 arose out of and in the course of her employment with respondent. The facts as set out in the Award of the Administrative Law Judge are not in dispute. On October 12, 1990, the claimant had attended a continuing education seminar at Washburn University. She stepped off the curb when leaving the seminar and twisted her ankle which resulted in a very severe sprain and also twisted her back. Claimant, as a licensed practical nurse, was required to have a certain number of hours of continuing education in order to keep her license current. It was to her employer's benefit that she keep her license. In fact, her position with respondent depended upon her being an LPN. Although the employer did not instruct the claimant as to which specific continuing education seminar she was to attend, they did pay her registration fee or tuition. Whether

this injury arose out of and in the course of claimant's employment with respondent is a close question. The parties do not cite nor does the Appeals Board find any Kansas case on point. K.S.A 1990 Supp. 44-501(a) provides in pertinent part:

> "If in any employment to which the worker's compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act."

As with all other aspects of this claim, claimant has the burden of proving that his injuries both arise out of and in the course of his employment. This requirement was recently described by the court in Kindel v. Ferco Rental, Inc., _____ Kan. _____, 899 P.2d 1058 (1995), where the court discussed these requirements as follows:

> "The two phrases arising 'out of' and 'in the course of' employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq*., have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service." [Citatations omitted.]

Id. at 1063.

K.S.A. 1990 Supp. 44-508(f) contains the following definition with respect to "arising out of and in the course of employment":

> "The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special

> risk or hazard and which is a route not used by the public except in dealings with the employer."

Larson's treatise states the general proposition that: "An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered, is within the course of employment." 1A Larson, The Law of Workmen's Compensation §27.00 (1995).

The closest factual situation among the Kansas reported decisions to the case at bar appears to be found in Blair v. Shaw, 171 Kan. 524, 233 P.2d 731 (1951). There, three automotive mechanics employed by respondent car dealership were killed in an automobile accident while returning to Fort Scott from an approved mechanic's examination offered in Pittsburg by the Chevrolet Division of General Motors Corporation. The Kansas Supreme Court held the claims compensable, finding the fatal injuries sustained by the three mechanics to have arisen out of and in the course of their employment with respondent. The Court found that the trip to take the examination was contemplated by the employment; that passing the examination would benefit the mechanic and would also result in benefit to the employer. The evidence did not show that the claimants were specifically directed or instructed to go, but it was a well-established custom of mechanics within the employment. The employer knew of the trip and furnished the gasoline for it.

In the case at hand, respondent attempts to draw a distinction between attending the seminar and the travel to and from the seminar. Respondent argues that since the claimant was injured in the parking lot that her claim should be subject to the going and coming exclusion contained in K.S.A. 1990 Supp. 44-508(f). The Blair case also addressed that question, wherein the court stated:

> "Having concluded that the trip to Pittsburg to take the examination was a part of the employment, it seems entirely logical to conclude that the entire undertaking is to be considered from a unitary standpoint rather than divisible. To take the examination it was necessary for decedents to make the round trip to Pittsburg. That involved travel by private automobile--going and returning--one project, so to speak, and included the normal traffic hazards inherent in such an undertaking. The act does not require that the injury be sustained on or about the employer's premises." *Id.* at 529.

In the case of Judith Brobst the employer did not suggest that any particular training or seminar would be preferable over another. Neither was there shown to be a habit or custom of attending certain training programs such as in the Blair case. Nevertheless, the fact that the respondent did pay for the seminar and that the seminar was for continuing education hours necessary for claimant to maintain her license, the Appeals Board finds claimant's injuries to have arisen out of and in the course of her employment. In its recent decision in the case of Chapman v. Beech Aircraft Corp., Docket No. 72,299 (opinion filed

December 8, 1995), the Supreme Court of Kansas reaffirmed this state's policy of liberally construing the Kansas Workers Compensation Act for the purpose of bringing employers and employees within its provisions and to provide the protections of the Act to both, citing K.S.A. 44-501(g). Our holding in this case is consistent with that policy.

We now turn to the issue of nature and extent of claimant's injury and resulting disability. Because hers is a "non-scheduled" injury, claimant is entitled to permanent partial general disability benefits under the provisions of K.S.A. 1990 Supp. 44-510e. The statute provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The deposition of a vocational expert was not taken. Instead, claimant relies on the records of vocational rehabilitation counselor Jerry Zook which were made a part of the record by joint stipulation of the parties. Mr. Zook submitted a Vocational Assessment/Evaluation Addendum "to document the claimant's wage potential and her rehabilitation options if she did not have the ongoing unrelated medical problems." In his opinion, claimant's work experience would indicate that she possesses transferrable skills in the area of medical terminology. The Addendum reads as follows:

> "This addendum is submitted in response to the assessment plan review of 8-5-92. This is sent to document the claimant's wage potential and her rehabilitation options if she did not have the ongoing unrelated medical problems.
>
> "The client's previous experience as a Certified Nurses Aide, Certification [sic] Medication Aide and Licensed Practical Nurse would indicate she possesses transferable skills in the area of medical terminology. Based on the restrictions submitted by Joseph L. Shaw, M.D. and if only these restrictions were to apply it would seem reasonable the client could perform work as a Medical Records Clerk or perform clerical and secretarial work in a medical office or doctor's office. However, since the client has no previous experience in clerical work she would be required to take a nine month re-education and training program either as a Medical Records Clerk

> or Medical Secretary. Upon completion of such training the client could expect to earn, based on entry level wages in this field, an average of $240.00 a week. After working for several years in this area the average weekly wage could reach $298.00 per week. The entry level wage would not return the client to comparable wage, however, comparable wage could be achieved with several years of experience. If the client were not to complete a re-education and training program and were to obtain work in the open labor market, entry level positions could be obtained. For example, Cashier positions could be obtained that would be within the restrictions assessed by Dr. Shaw, however, these are entry level positions and would pay minimum wage of $4.50 per hour."

Mr. Zook reports that he relied upon the restrictions contained in a letter from Dr. Shaw dated April 13 wherein he advised that claimant will not be able to do any repetitive bending, stooping, lifting or working for long periods of time with her arms over her head. Mr. Zook concludes that the claimant would not benefit from vocational rehabilitation services because of her ongoing medical problems unrelated to her workers compensation claim. Although claimant has reached maximum medical improvement for her work-related neck, back and ankle injuries, he considered her essentially unemployable as a result of her unrelated medical problems. Mr. Zook does not offer an opinion concerning claimant's loss of access to the open labor market as a result of her work-related injuries. It is apparent that she cannot return to her regular job duties as an LPN with the respondent. However, it is not apparent from the record what labor market loss could be assigned to this claim. Mr. Zook does not appear to be of the opinion that claimant is essentially unemployable or permanently totally disabled solely as a result of her work-related injuries. He clearly is of the opinion that claimant could otherwise perform certain entry level positions, such as a cashier position, within the restrictions assessed by Dr. Shaw. Only claimant's unrelated medical problems, or these problems coupled with her work-related injuries, prevent her from performing these positions.

In determining the work disability award for the second injury, the Administrative Law Judge used the loss of labor market opinion which combined all the injuries and medical problems. He found the total resulting loss of access to the labor market to be 100%. The Administrative Law Judge then used Mr. Zook's opinion as to claimant's loss of ability to earn wages, which took into consideration only her work-related injuries. Applying the formula approved in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), giving equal weight to both prongs of the two-part test, the Administrative Law Judge found claimant had sustained a 71.03% work disability.

The Appeals Board agrees that the vocational rehabilitation record received into evidence by the stipulation of the parties contains adequate support to find a 42.05% wage loss based upon Mr. Zook's opinion concerning her ability to earn an entry level wage of $4.50 per hour utilizing the final restrictions of Dr. Shaw. However, the record is lacking

with regard to evidence of labor market loss. Mr. Zook's opinion to the effect that claimant is essentially unemployable relates to her overall condition at the time that he evaluated her from a vocational standpoint. This included the medical problems claimant developed or which were diagnosed after her last day of working for the respondent and which were conditions unrelated to her work-related injuries. Nowhere does he give an opinion of labor market loss utilizing the restrictions of Dr. Shaw or any other restrictions for that matter, which result from the work-related injuries alone. As such, the Appeals Board finds that the claimant has failed to meet her burden of proof with regard to the loss of labor market access. The labor market loss should therefore be considered to be 0%. When comparing $4.50 per hour to the stipulated average weekly wage of $310.62, the actual wage loss is 42.05 %. Giving equal weight to a 0% loss of labor market and a 42.05% wage loss results in a work disability of 21%.

The Administrative Law Judge deducted the total number of weeks of temporary partial disability from the 415 weeks available for payment. The Appeals Board previously decided in the case of Richardson v. Wichita Arms, Inc., Docket No. 176,396 (August 19, 1994) that the proper method to account for the payment of temporary partial disability compensation is to convert the amount of temporary partial paid into a weekly equivalent by dividing the total sum of temporary partial disability benefits paid by the weekly temporary total disability benefit rate. Therefore, the 24.57 weeks of temporary partial disability benefits that respondent paid claimant during the pendency of this claim at the rate of $26.62 per week in the sum of $654.12, represents the equivalent of 3.16 weeks temporary total disability which we find to be the correct figure to be used in calculating claimant's award.

Docket No. 152,448

Counsel for respondent agreed during oral argument that the findings, conclusions and award of the Administrative Law Judge in Docket 152,448 should be affirmed. Counsel for the Fund agreed with the respondent's position. Counsel for claimant conceded that the record does not establish that claimant's psychological injuries and/or traumatic neurosis are the result of the work injuries and therefore would not disagree with the finding of the Administrative Law Judge. Claimant's counsel does dispute the Administrative Law Judge's finding that the claimant's activities upon her returning to work on October 30 and 31, 1990 caused only a temporary aggravation of her preexisting condition and was not a new accident. The Administrative Law Judge relied upon the opinion of Dr. Shaw in this regard. Having reviewed the entire record, the Appeals Board agrees with the finding by the Administrative Law Judge.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of the Administrative Law Judge Floyd V. Palmer entered in this proceeding on June 30, 1994 in Docket Nos. 152,448 and 152,449 should be affirmed in all respects. In Docket No. 152,447 the Award should be modified to find a work disability of 21%. All the other findings, conclusions and orders of the Administrative Law Judge are hereby adopted by the Appeals Board.

IN DOCKET NO. 152,447 AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Judith Elaine Brobst, and against the respondent, Brighton Place North, and its insurance carrier, Church Mutual Insurance Company, and the Kansas Workers Compensation Fund, for an accidental injury which occurred October 12, 1990. Based upon an average weekly wage of $310.62, the claimant is entitled to 36.43 weeks temporary total disability at the rate of $207.09 per week or $7,544.29, and 3.16 weeks of temporary total disability for the equivalent period of temporary partial disability at the temporary total rate of $207.09 per week or $654.12, followed by 375.41 weeks at $43.49 per week or $16,326.58 for a 21% work disability making a total award of $24,524.99.

As of December 29, 1995, there is due and owing claimant 36.43 weeks of temporary total disability compensation at the rate of $207.09 per week or $7,544.29, and 3.16 weeks of temporary total disability compensation for the equivalent period of temporary partial disability at the temporary total rate of 207.09 per week or $654.12, followed by 232.41 weeks of compensation disability at the rate of $43.49 per week in the sum of $10,107.51, for a total of $18,305.92 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $6,219.07 is to be paid for 143 weeks at the rate of $43.49 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Elmer J. Schumacher, Topeka, KS
Andrea Stubblefield, Topeka, KS
Jeffrey K. Cooper, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director